80-460

CASE NO. _____

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

JOSEPH FRANCIS MERLO,
RAYMOND PARKS,
HARRY BLACKFORD,

Petitioners,

—v—

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

1. Where affidavits submitted to a trial court identify specific portions of a search warrant which are material and necessary to a finding of probable cause but which are false, and proof of deliberate falsity or reckless disregard of truth by the search warrant affiant because of the inclusion of false information, or the omission of exculpatory or conflicting information within the knowledge of the affiant at the time the search warrant affidavit was drafted, is offered by reference, in an affidavit, to the sworn testimony of the affiant and his subordinate colleagues, and by reference to documents, referred to by the search warrant affiant, which were introduced as exhibits in a related case, has a sufficient showing of falsity or reckless disregard for the truth of material and necessary facts in the search warrant affidavit been made to require an evidentiary hearing to determine whether there have been Fourth Amendment violations?

2. Where a defendant enters a plea of no contest pursuant to plea bargaining negotiations in which no charges are dropped against the defendant and no concessions are made in a recommended sentence for incarceration and fines so that the sole predicate for the plea of no contest is a stipulation of facts which is to be tested for sufficiency of proof of the essential elements of the crimes charged, if the defendant is not permitted by an appellate court to challenge the sufficiency of the evidence presented in the stipulation of facts, does the right to due process guaranteed by the Fourteenth Amendment require that the convictions and sentences pursuant to a no contest plea be vacated and the case remanded to the trial court for further proceedings?

3. Where a search warrant fails to particularize the items to be seized except to direct seizure of documents which are evidence of the violation of a criminal statute which is extremely broad in scope

and vague in definition, is the warrant overbroad in violation of the requirements of the Fourth Amendment?

4. Are the requirements of the Fourth Amendment satisfied where a magistrate, in issuing a search warrant, relies solely upon conclusions drawn by a law enforcement officer involved in an investigation of possible criminal violations because of the alleged expertise acquired in the course of that investigation by the officer, rather than requiring the presentation of the underlying facts and circumstances to support the conclusions set forth in the affidavit for a search?

5. Is a state criminal statute violative of due process standards of the Fourteenth Amendment where that statute attaches criminal liability upon standards which are not defined by the statute because the statute does not provide clear notice of prohibited conduct and ascertainable standards of guilt?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners Joseph Francis Merlo, Raymond Parks and Harry Blackford pray that a writ of certiorari issue to the Ohio Supreme Court to review the judgment of that court which dismissed petitioners' appeal to that court for want of substantial constitutional question. The dismissal by the Ohio Supreme Court of the appeal thereby affirmed the judgment of the Ohio Court of Appeals for the Ninth Appellate District which affirmed petitioners' convictions in the Court of Common Pleas for Summit County, Ohio, for illegally conducting a bingo game, Ohio Revised Code §2915.09(A)(2), for theft, Ohio Revised Code §2913.02, and for gambling, Ohio Revised Code §2915.02.

OPINIONS BELOW

The judgment of the Ohio Supreme Court was rendered without opinion and was unreported. It is set forth in the Appendix at 36a-37a. The decision and journal entry of the Ohio Court of Appeals for the Ninth Appellate District

is unreported and is set forth in the Appendix at 1a-26a.

JURISDICTION

The judgment of the Ohio Supreme Court dismissing petitioners' appeal as of right was entered on June 18, 1980. Appendix at 36a. On August 8, 1980, Mr. Justice Stewart granted an order extending the time within which to file a petition for a writ of certiorari from August 17, 1980 to and including September 16, 1980. Appendix at 38a.

This petition seeks review of a final judgment rendered by the Ohio Supreme Court, the highest court in the State of Ohio in which a decision could be had. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Fourth, Fifth, Sixth and the pertinent portion of the Fourteenth Amendment to the United States Constitution is set forth in the Appendix at 39a-41a. The text of Ohio Revised Code §§2913.02, 2915.01, 2915.02(A)(2), 2915.09(A)(2) and 2923.04 is set forth in the Appendix at 42a-87a.

STATEMENT OF THE CASE

On June 14, 1978, a four-count indictment was filed in the Common Pleas Court for Summit County, Ohio, charging the petitioners, Joseph Francis Merlo, Raymond Parks, Harry Blackford and five other persons with the crimes of engaging in organized crime (R.C. §2923.04), illegally conducting a bingo game (R.C. §2915.09(A)(2)), theft (R.C. §2913.02) and gambling (R.C. §2915.02). The issuance of the indictment occurred three days after massive, simultaneous raids were conducted by sheriff's deputies at various locations in Summit and Stark Counties.

The raids were conducted under color of seventeen search warrants which authorized the search of the two bingo halls, seven residences, including those of the petitioners, and eight automobiles. The warrants[1/] were all based upon a single

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[1/] Two search warrants which authorized the search of two autos were returned unexecuted.

"Affidavit for Search Warrant" (Appendix at 100a). Sheriff's deputies executed the warrants and seized papers, records and money from several of the residences. Large quantities of personal papers and effects were also seized from the petitioners' residences (see, e.g., 1T. 155,[2/] Pre-trial Order of Common Pleas Court, Appendix at 27a).

The search warrant affidavit was ostensibly based upon the intermittent surveillance of the bingo halls and the petitioners' residences by the affiant and deputies who he directed and by the affiant's review of bingo reports filed with the Office of the Ohio Attorney General by the bingo game operators. During the course of pretrial discovery and during the course of the separate trial of two of the petitioners' co-defendants, trial counsel for petitioners became aware of statements by the affiant in the warrant affidavit

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[2/] Record references are indicated by volume number, followed by T., followed by the page number.

which were in direct conflict with information in the bingo reports submitted to the Attorney General and in direct conflict with sworn testimony by the affiant and subordinate officers at the trial of petitioners' co-defendants.[3/] Thereafter, counsel for petitioners timely filed motions to suppress evidence obtained in the searches and seizures based in part on the argument that false statements, material to a finding of probable cause, were intentionally or recklessly included in the search warrant affidavit by the affiant, and facts within the knowledge of the affiant were intentionally or recklessly omitted. Affidavits in support of a request for an evidentiary hearing were filed by attorneys for petitioners (4T. 12-15, Appendix at 88a-99a) attesting to the clear conflict between the search warrant

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[3/] State v. Bruce Miller and Gary Hall, Summit County Common Pleas Court, Case No. 78-06-0663. Any record references to this transcript of the proceedings will be cited State v. Miller at __.

affiant's sworn testimony in a related trial, and between exhibits introduced at that trial, and specifically identified sections of the search warrant affidavit which were material and indispensable to any finding of probable cause.[4/] After an in camera inspection of the affidavits, the trial court overruled petitioners' motions for an evidentiary hearing (Pretrial Order of Common Pleas Court at 2, Appendix at 30a, 4T. 14).

Petitioners also filed pretrial motions to suppress seized evidence on grounds that the warrants were issued without probable cause (3T. 5) and that the warrants were overbroad because they permitted seizure of any evidence of engaging in organized crime, a broad and ill-defined statute (3T. 47).

[4/] Counsel for each petitioner submitted initial affidavits which were identical, or virtually identical. Supplementary affidavits were filed with the trial court by attorneys for petitioners Merlo and Parks. They were virtually identical in content. Petitioner Blackford joined in the supplementary affidavits (4T. 13).

Motions to dismiss the indictment were filed on behalf of the petitioners on the grounds that the organized crime statute (R.C. §2923.04)[5/] and the bingo statute (R.C. §2915.09(A)(2)) were unconstitutional because they violated federal due process standards (2T. 10, 2T. 15, Appendix at 119a-121a). Although the trial court found that deputies had seized items beyond the scope of the warrant at many of the locations searched (Pretrial Order of Common Pleas Court 2-5, Appendix at 27a-28a), the trial court overruled the motions to suppress.

5/ The organized crime statute, R.C. §2923.04, subsequently was found to be unconstitutional by the Ohio Supreme Court in an unrelated case, State v. Young, 62 Ohio St. 2d 370 (1980).

The trial court also overruled all facets of the motion to dismiss (Pretrial Order of Common Pleas Court, Appendix at 29a , 30a).

Following completion of the trial of two of petitioners' co-defendants (State v. Bruce Miller and Gary Hall), petitioners and the remaining co-defendants entered into plea bargaining negotiations with the prosecution. Early in the plea bargaining negotiations, it was clear that a negotiated no contest plea was completely contingent upon whether the parties could agree to a stipulation of facts. It was clear to the parties that petitioner Merlo's contention would be that, upon the facts which were to be stipulated by the parties, there was insufficient proof of any crime committed by Joseph Merlo. At a March 12, 1979 proceeding, the prosecutor reported to the trial court on the progress of the plea bargaining negotiations:

> "Okay. Now, underlying the entire --an underlying part of this agreement with regards to all six Defendants is that 9:00

o'clock on Wednesday morning, all Counsel are going to meet in the Prosecutor's Office to see whether or not we can agree upon the underlying factual basis for the no contest pleas, allow all Counsel and the State to feel that the appeal rights have been adequately preserved in that entire matter. It is contingent upon us agreeing on Wednesday, and if we are in agreement, we will be here at 1:30 on Wednesday for pleas. If not, we will be here at 9:00 o'clock, Thursday morning to pick a jury." (5T. 29).

After a brief exchange, the prosecutor repeated the understanding:

"[U]nderlying this entire agreement is our ability to agree on the procedure and factual basis underlying the pleas because there will probably be appeals in this case because everybody is pleading no contest. And if we agree on this meeting to be held at 9:00 o'clock, Wednesday morning in my office, we will be here at 1:30 on Wednesday for pleas.

"If we cannot agree on it, we will be here at 9:00 o'clock, Thursday, for jury selection." (5T. 30).

On Wednesday, March 14, 1979, the prosecutor reported to the court that an agreement on stipulated facts had been reached. The prosecutor briefly described the

agreement on negotiated pleas to the court and stated:

> "And Defendants--I would state to the Court--do intend to have--indicated the desire that they do intend to perfect their appeals after the findings--if and when the Court makes findings of guilty and sentences with regards to these no contest pleas." (5T. 35, emphasis added).

Moments later, in an exchange concerning stays pending appeal, the trial court stated:

> "Stay would be granted, if the Court would find guilty." (5T. 36, emphasis added).

Each defendant thereafter entered pleas of no contest pursuant to the plea bargain agreement with the prosecutor.

Petitioner Harry Blackford pleaded no contest to the counts charging illegally conducting a bingo game, grand theft and gambling, and the trial court granted dismissal of the charge of engaging in organized crime (5T. 55, 58). Petitioner Raymond Parks also pleaded no contest to charges of illegally conducting a bingo game, grand

theft and gambling, and the Count I charge of engaging in organized crime was dismissed (5T. 62). The prosecutor's recommended sentence for Blackford and Parks was probation.

The plea bargain for Joseph Merlo did not include dismissal of the organized crime count (5T. 26, 32-33), nor did it include a recommendation for leniency in sentencing. Rather, the prosecution recommended maximum sentences of incarceration and fines for each of the crimes charged (5T. 26, 32-33). Pursuant to the agreement on the stipulation of facts, petitioner Merlo pleaded no contest to all four counts of the indictment (5T. 41-42).

The prosecutor then recited the stipulation of facts that had been agreed upon. The stipulation of facts included most of the transcript of the State's evidence and exhibits received in the related case of State v. Bruce Miller (5T. 65-66, 73).

The prosecutor's theory in the case was that the petitioners were all involved

to some extent with other named co-defendants in the operation of two bingo halls. Petitioner Raymond Parks allegedly ran one hall and petitioner Blackford allegedly ran the other. Each hall was associated with two churches which held Ohio licenses to run bingo games on two nights per week. Raymond Parks and Harry Blackford allegedly managed supply companies which provided the games with all of the necessary supplies. The prosecution contended that the churches were overcharged for the supplies, in violation of the gambling statutes.

Further, the prosecution sought to prove that petitioner Joseph Merlo, with his wife, his sister, and with petitioner Parks' wife, aided petitioners Parks and Blackford in the transportation of cash receipts from the games at the halls and that this money was improperly withheld or "skimmed" from the churches.

The stipulation of facts was almost entirely derived from surveillance and the

searches and seizures. The transcript of the State's case in State v. Miller included the testimony of three members of the sheriff's department concerning the surveillance which was conducted intermittently, during a two-month period, for a total of only seventeen days, from inside unmarked cars parked at varying distances from the places being watched (See, e.g., State v. Miller at 359, 399). Surveillance never showed movement of persons or packages from the bingo hall to the Merlo residence, although several of the co-defendants were seen arriving and leaving at the apartment building where petitioner Merlo and his wife resided (E.g., State v. Miller, 361, 365, 373-375, 407, 410).

There were only two occasions when surveillance disclosed that petitioner Merlo was even at home. On April 19, 1978, detectives photographed Joseph Merlo as he parked his car in front of 1342 Weathervane Lane

(State v. Miller, 366). No further activity by any of the co-defendants was observed on that day. On April 30th, Joseph Merlo was seen driving away from the Weathervane Lane apartment (State v. Miller, 409). Later, Joseph Merlo returned to Weathervane Lane in the company of Raymond Parks; Merlo was observed holding a green cloth object in his hand. Officers speculated that it was a bank bag. Raymond Parks left with his wife Cecilia who had arrived earlier (State v. Miller, 411). A short time later, Joseph and Nancy Merlo left their apartment and drove off (State v. Miller, 411).

Among the exhibits introduced as part of the prosecution's case were a brown metal file box (State Ex. 29), a brown vinyl attache case (State Ex. 30), and a brown paper bag with ledger books (State Ex. 31), all of which were seized during the search of the apartment of Joseph and Nancy Merlo at 1342 Weathervane Lane (State v. Miller, 384-386). The brown metal box and the brown

vinyl attache case contained receipts and papers from AAA Concessions Company which operated the concession stands at the bingo halls (2T. 313, 342-346). Labels on the ledger books connected them with the bingo halls (5T. 71). However, the handwriting in the ledger books subsequently was identified by a handwriting expert as that of Merlo's wife (5T. 71), as was the handwriting in an address book seized from the Merlo apartment (5T. 71). None of the evidence seized from any of the locations was connected to Joseph Merlo, by handwriting analysis or otherwise.

Other than the surveillance testimony described above, the only evidence concerning Joseph Merlo was the testimony of a worker at one of the bingo halls. She testified that she knew Merlo prior to working at the bingo halls (State v. Miller, 312). She stated that on the day people were being hired to work at one of the bingo halls, she

saw Merlo at the hall (State v. Miller, 313). Raymond Parks and Harry Blackford were also at the hall (ibid.). The worker was not asked to explain, nor did she explain, what, if anything, Merlo did at the hall on that one occasion. That was the total evidence contained in the stipulation of facts against petitioner Merlo, other than the fact that his wife, his sister, and several acquaintances were implicated in the bingo operation.

After the stipulation of facts was presented by the prosecutor, counsel for petitioner Merlo moved for judgment of acquittal:

> "[W]e would urge that the Court enter a judgment of acquittal on the basis of the fact that none of the charges have been proved on the basis of the recital of facts which the prosecution has just stated to the Court." (5T. 76-77).

No objection was entered by the prosecution to petitioner Merlo's motion for acquittal; indeed, because it was anticipated. The trial court, however, overruled the motion

(5T. 79) and sentenced Merlo, Parks, Blackford and their co-defendants to the sentences recommended by the prosecutor.

Thus, the trial court found appellants Raymond Parks and Harry Blackford guilty of illegally conducting a bingo game, grand theft and gambling, and sentenced each of the petitioners to suspended concurrent imprisonment of two to ten years for grand theft and six months for gambling. The trial court also imposed a fine of $3,500.00 on each appellant and placed Parks and Blackford on probation for a period of two years (5T. 80-83). Petitioner Merlo was found guilty of all four counts in the indictment (5T. 83). The trial court sentenced appellant Merlo to concurrent terms of imprisonment of five to twenty-five years for engaging in organized crime, three to ten years for illegally conducting a bingo game, two to five years for grant theft and six months for gambling. Joseph Merlo was also

fined $18,000.00 in connection with the four counts in the indictment (5T. 85-86). Execution of sentences was stayed pending appeal (5T. 78, 79, 80, 81, 83, 86).

On appeal, the court of appeals held that petitioner Merlo could not test the denial of his motion for acquittal, pursuant to a plea of no contest (Opinion of Court of Appeals, Appendix at 5a-14a). However, the court did not vacate the convictions and the plea and remand for further proceedings. The appellate court simply affirmed Merlo's convictions.[6/]

[6/] Although the court of appeals overruled petitioner Merlo's argument that the organized crime statute (R.C. §2923.04) was unconstitutional (Opinion of Court of Appeals, Appendix at 20-21a), the court, sua sponte, reversed petitioner Merlo's conviction on Count I for engaging in organized crime and dismissed that count because Merlo had been convicted of the substantive crimes in Counts II, III and IV. (See, Opinion of Court of Appeals, Appendix at 24a). Subsequently, in an unrelated case, the Ohio Supreme Court held that the organized crime statute, R.C. §2923.04 was unconstitutionally vague, in violation of the Fourteenth Amendment (State v. Young, 62 Ohio St. 2d 370 (1980)).

The court of appeals also overruled petitioners' arguments that the trial court erred by not granting an evidentiary hearing on the question of intentional or reckless inclusion of false material statements in the search warrant affidavit. The court held the affidavits by counsel which referred to the search warrant affiant's testimony in the related case of State v. Miller were procedurally insufficient because they were "hearsay statements" (Opinion of Court of Appeals, Appendix at 19a). The court also overruled arguments concerning the lack of probable cause for the issuance of the warrants and the overbreadth of the warrants (Opinion of Court of Appeals, Appendix at 15a-18a). The Court denied petitioners' assignments of error that the bingo statute, §2915.09(A)(2), violated Fourteenth Amendment due process standards. The court held that petitioners could not complain of the vagueness of §2915.09(A)(2) because the

facts showed that they violated other provisions of the statute (Opinion of Court of Appeals, Appendix at 22a). However, the court failed to note that petitioners were charged in Count II only with a violation of 2915.09(A)(2), and not with other sections of the statute (which were only misdemeanors).

With the exception of the court's sua sponte reversal of petitioner Merlo's conviction for engaging in organized crime (see, footnote 5, supra, at 18), the court of appeals denied all assignments of error and affirmed petitioners' convictions (Appendix at 25a).

Petitioners' subsequent appeal to the Ohio Supreme Court was dismissed without opinion (Appendix at 36a).

REASONS FOR GRANTING THE WRIT

I. AN IMPORTANT QUESTION FOR REVIEW IS PRESENTED, INVOLVING THE NEED FOR CLARIFICATION OF THIS COURT'S DECISION IN FRANKS V. DELAWARE, 438 U.S. 154 (1978), CONCERNING THE ENTITLEMENT TO AN EVIDENTIARY HEARING ON THE QUESTION OF FALSE STATEMENTS INCLUDED INTENTIONALLY, OR WITH RECKLESS DISREGARD FOR THE TRUTH, BY THE AFFIANT IN A SEARCH WARRANT AFFIDAVIT WHERE THE FALSE STATEMENTS ARE MATERIAL AND NECESSARY TO A FINDING OF PROBABLE CAUSE.

In Franks v. Delaware, 438 U.S. 154 (1978), this Court held that

> "Where a defendant makes a substantial showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." 438 U.S. at 155-156.

In the instant case, petitioners carefully followed the procedures required by Franks. The affidavits of petitioners' counsel set forth specific "allegations of deliberate falsehood or reckless disregard for the truth." (Affidavit, paragraph 2,

Appendix at 95a, Supplementary Affidavit, paragraph 4, Appendix at 89a). Furthermore, the allegations were supported by specific reference to "the portion of the warrant affidavit that [was] claimed to be false." The affidavit pointed to falsehoods in the affiant's claim of illegal activity and to falsehoods in the allegation of the transportation of bingo receipts. (Affidavit, paragraphs 3 and 4, Appendix at 96a, Supplementary Affidavit, paragraphs 5, 6, 7, Appendix at 89a-90a).

"Supporting reasons" required by Franks for the claim of falsity were provided and the sources of proof of those reasons--the sworn testimony, in the related case of State v. Miller, of the affiant and detectives who affiant supervised, and reference to State Exhibits in State v. Miller (bingo operators' reports to the Attorney General - SX. 1, 2; summary of audits - SX. 3)--were also provided in counsel's affidavits. Reference to the bingo operators' reports to the Attorney

General supplied an offer of proof that material facts had been omitted. If the statements which were attacked as deliberately or recklessly false had been omitted, the affidavit in support of the search warrants clearly would have failed to set forth sufficient facts of underlying circumstances to support a finding of probable cause. In fulfilling this last requirement of Franks, the appellants met every requirement of the Franks test.

Counsel's affidavits did not include affidavits or sworn statements of witnesses simply because the affidavits pointed to the sworn testimony of the affiant and other detectives who were prosecution witnesses in the related case of State v. Miller to demonstrate that the allegations of appellants' counsel were substantial.

However, despite petitioners' substantial showing, the lower courts refused to recognize petitioners' right to an evidentiary hearing.

Since the decision in Franks, lower court decisions have shown a continued lack of uniformity in the availability of an evidentiary hearing on the question of the inclusion of false statements in a search warrant affidavit. Some courts have ordered evidentiary hearings without requiring a substantial showing by the defendant or without assessing whether the allegedly false statements were necessary to a finding of probable cause. See, State v. Louchheim, 296 N.C. 314, 250 S.E. 2d 630 (1979). Cf. United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980). Other courts, such as the lower courts in the instant case, have required much more than the "substantial showing" set forth in Franks to permit an evidentiary hearing to be held. In the present case, although the petitioners' attorneys supplied numerous examples of false statements in the search warrant affidavit, the appellate court denied petitioners an inference that the false statements were made intentionally

or recklessly. In effect, the court required petitioners to prove their entire case through an adverse witness, the affiant, in advance of an evidentiary hearing. Barriers to evidentiary hearings, such as those erected by the courts in this case, are totally contrary to the aim of the Franks decision.

Moreover, while the Franks decision dealt with the inclusion of false statements in a search warrant affidavit, this Court did not decide whether a showing of the omission of exculpatory facts, or facts otherwise material to the question of probable cause required an evidentiary hearing. Although several federal and state courts have determined that an evidentiary hearing should be held on the question of omission of material facts, where a sufficient showing has been made (e.g., United States v. Park, 531 F.2d 754 (5th Cir. 1976), United States v. House, 604 F.2d 1135 (8th Cir. 1979)), this Court's guidance would resolve a

question of great significance to rights guaranteed by the Fourth Amendment and left undecided by the Franks decision.

Review of the question presented in this case would provide needed clarification of the Franks decision which, in turn, would have a salutary effect upon the already severely strained resources of the criminal justice system by eliminating unnecessary evidentiary hearings while assuring availability of an evidentiary hearing where a proper showing has been made. Because of the importance of the question presented herein, a writ of certiorari should be granted.

II. AN IMPORTANT QUESTION IS PRESENTED FOR REVIEW CONCERNING WHETHER CONVICTIONS AND SENTENCES ENTERED PURSUANT TO A NO CONTEST PLEA IN STATE CRIMINAL PROCEEDINGS MUST BE VACATED UNDER DUE PROCESS REQUIREMENTS WHERE THE SOLE PREDICATE TO THE DEFENDANT'S PLEA OF NO CONTEST PURSUANT TO PLEA BARGAINING NEGOTIATIONS IS A STIPULATION OF FACTS WHICH IS INTENDED TO BE TESTED FOR SUFFICIENCY OF PROOF OF THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED, BUT THE DEFENDANT, AFTER ENTRY OF THE PLEA,

IS NOT PERMITTED TO CHALLENGE THE SUFFICIENCY OF THE EVIDENCE PRESENTED IN THE STIPULATION OF FACTS.

In the present case, petitioner Joseph Merlo entered pleas of no contest to all counts of a four-count indictment pursuant to an agreement reached in plea bargaining negotiations. No reduction in charge or leniency in sentence was involved in the plea bargain. Petitioner Merlo was charged with four crimes and he pleaded no contest to all four crimes (5T. 83). Further, under the terms of the plea bargain, the prosecutor recommended that maximum imprisonment and maximum fines be imposed in sentencing (5T. 26, 32-33). The only basis for the no contest pleas by petitioner Merlo, was that the pleas were conditioned upon agreement by petitioner and the prosecution to a stipulation of facts (5T. 29-30) and the trial court would make a finding of guilt or innocence based upon that stipulation of facts (5T. 35, 38, 83).

After recital of the stipulation of facts by the prosecution (5T. 65-74),

appellant Merlo moved for judgment of acquittal on all counts of the indictment (5T. 76), but the motion was denied by the trial court (5T. 77). After findings of guilty based upon the stipulation of facts were made by the trial court (5T. 83), the sentence previously recommended by the prosecution (see, 5T. 26, 32-33), was imposed by the trial court (5T. 85-86).

On appeal, appellant Merlo assigned as error that judgment of acquittal should have been entered by the trial court on all counts of the indictment, based upon the stipulation of facts which was presented to the trial court. The court of appeals denied the assignment of error and affirmed appellant Merlo's convictions on the basis that the agreement between Merlo and the prosecutor contemplated an invalid procedure because a no contest plea does not permit a defendant to challenge the sufficiency of evidence contained in a stipulation of facts (Opinion of Court of Appeals, Appendix at 12a); despite the fact that the only basis for the with-

drawal of appellant Merlo's plea of not guilty and the entry of a no contest plea was agreement upon a stipulation of fact from which the trial court would make a finding of guilt or innocence.

This Court has recognized that plea bargaining is an essential part of the administration of justice.

> "If every criminal charge were subjected to full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." Santobello v. New York, 404 U.S. 257, 260 (1971).

However salutary the effect of plea bargaining is on the functioning of the criminal justice system, this Court has repeatedly stated that there must be safeguards to insure considerations of due process in the securing of an agreement between a defendant and the prosecution. See, Brady v. United States, 397 U.S. 742 (1970); Moore v. Michigan, 355 U.S. 155 (1957).

Included among the due process safeguards to plea bargaining is the requirement

that a defendant must receive the benefits of the plea bargain in exchange for the plea which is entered. In Santobello v. New York, 404 U.S. 257 (1971), the United States Supreme Court held that:

> "[T]he adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262 (Emphasis added).

The court in Santobello went on to hold that the prosecution's breach of a plea bargaining promise entitled the defendant to either specific performance of the agreement or the vacating of the plea. 404 U.S. at 263.

The plea bargaining negotiations in this case centered on whether the prosecution and appellant Merlo could agree to a stipulation of facts upon which the trial court would make a finding of guilt or innocence. There

was no other purpose to the stipulation of facts. If, as the court of appeals contended, the agreement between Merlo and the prosecution was invalid because the trial court was without power to accept a no-contest plea contingent upon the weighing of a stipulation of facts, then the court of appeals should have vacated the convictions and sentences and remanded for further proceedings. In holding petitioner Merlo to his pleas of no contest while ignoring the conditioned basis for the entry of such pleas, the court of appeals denied petitioner Merlo due process protections of the Fourteenth Amendment.

Although lower court decisions are in agreement with the Court's decision in Santobello v. New York, supra, that a prosecutor's promise must be fulfilled when a plea is based upon that promise and is induced by that promise, there is some question as to whether a defendant is entitled to relief where a prosecutor has made promises beyond his power to fulfill. In Palermo v. Warden,

Green Haven State Prison, 545 F.2d 286 (1976), the Second Circuit Court of Appeals held that the reasoning of Santobello required that relief be afforded to a defendant who was induced to a plea by a prosecutor's promise which was unfulfillable. Id., 545 F.2d at 296. That decision was in agreement with the Fourth Circuit Court of Appeals' position enunciated in United States v. I. H. Hammerman, II, 528 F.2d 326 (4th Cir. 1975).

However, this case presents an appropriate vehicle to further clarify the protection which surrounds a process which is absolutely essential to the orderly and effective functioning of the criminal justice system. Although the protections afforded defendants through this Court's decision in Santobello were substantial, this Court should should emphasize that a defendant is entitled to relief from a bargained plea, where a promise is breached, regardless of whether the prosecutor's promise which induced the plea was within the prosecutor's power to fulfill. Therefore, petitioner respectfully urges

this Court to grant review of this case.

III. AN IMPORTANT QUESTION IS PRESENTED FOR REVIEW CONCERNING WHETHER THE PARTICULARITY REQUIREMENTS OF THE FOURTH AMENDMENT ARE SATISFIED WHERE A DESCRIPTION PROVIDED BY THE WARRANT OF ITEMS TO BE SEIZED DIRECTED SEIZURE OF BOOKS AND RECORDS THAT WERE EVIDENCE OF A VIOLATION OF A CRIMINAL STATUTE WHICH WAS EXTREMELY BROAD IN SCOPE AND VAGUE IN DEFINITION.

On June 9, 1977, a judge of the Summit County Common Pleas Court issued search warrants authorizing the search of two businesses, seven residences and eight automobiles. The homes and automobiles of the petitioners were searched pursuant to those warrants and numerous items were seized pursuant to the language of the search warrants all of which contained the same description of the things which could be seized:

> "[F]or certain property, namely:
>
> 1. Supplies, books and records and proceeds of illegal games and gambling paraphernalia, which is evidence of the commission of a criminal offense, or the fruits of that crime, to wit: Engaging in Organized Crime and Conducting

an Illegal Bingo Game." (Emphasis added).

Pursuant to the broad authorization of the warrant, members of the Sheriff's department seized hundreds of items, including numerous personal effects of each of the petitioners. Indeed, the trial court specifically ordered the return of many items which it found were improperly seized (Pretrial Order of Common Pleas Court, Appendix at 27a, See also, T. 155).

In the instant case, the warrants were constitutionally defective because they allowed virtually unrestricted discretion by the officer executing the warrant as to what was to be seized.

The crime of Engaging in Organized Crime, set forth in R.C. §2923.04, was extremely broad in scope and vague in definition. Indeed, so vague in definition that the Ohio Supreme Court recently found the statute to be unconstitutionally vague, in violation of due process protections of the

Fourteenth Amendment. State v. Young, 62 Ohio St. 2d 370 (1980). The Ohio Supreme Court described the impermissible scope of the statute as reaching the facilitation of any activities of a criminal syndicate whether legal or illegal. The court felt virtually any activity fell within the statute's reach. 62 Ohio St. 2d at 376-376. Furthermore, the court emphasized that because the definition of a criminal syndicate included "five or more persons collaborating to promote or engage in any offense for the purpose of gain" (R.C. §2923.04(C)(7)), the statute, again, had virtually limitless scope because of its vagueness. 62 Ohio St. 2d at 378.

Thus, it becomes clear that an officer, authorized to search for evidence of Engaging in Organized Crime, was given unlimited discretion to conduct a general, exploratory search for evidence of any criminal offense identified in the criminal statutes. The offense of Engaging in Organized Crime was

in no manner restricted to only bingo related activity. The fact that the officers often ventured far from items connected with bingo (See, Pretrial Order of Common Pleas Court, Appendix at 27a), underscores the limitless direction of the warrant. The only limitation in the warrant (actually, no limitation at all) was that the property to be seized be roughly classified as "supplies, books and records."

Clearly, the warrants in this case do not meet the standards of particularity approved by this Court in Andresen v. Maryland, 427 U.S. 463 (1976). In rejecting the argument that the warrants in that case were rendered general warrants because of the inclusion of the phrase, "together with other fruits, instrumentalities and evidence of crime at this [time] unknown," the Court stated that that phrase should be read with preceding language which was highly particularized. 427 U.S. at 481-482. However, the particularization present in the Andresen

warrants simply was not present in the warrants in the instant case. Moreover, mere inclusion of a crime of conspiracy does not render a warrant invalid, if sufficient particularity is supplied to define the crime of conspiracy. Thus, in reversing a suppression order granted by a district court because of the overbreadth of a search warrant, the Circuit Court of Appeals for the District of Columbia held that authorization to seize evidence of "conspiracies to steal government property and obstruct justice" did not run afoul of the particularity requirement of the Fourth Amendment because the warrant authorization was specifically referenced to an accompanying affidavit which defined the "conspiracies" with sufficient particularity. In re Search Warrant Dated July 4, 1977, 572 F.2d 321 (D.C. Cir. 1977), cert. den. 435 U.S. 925 (1978). However, the fatal flaw in this case is the failure to provide any further particularization beyond the reference to two criminal statutes.

This case presents an appropriate opportunity to the Court to supply additional guidance to federal and state trial courts and federal and state law enforcement agencies in an area of great complexity. This case presents another facet of the problem confronted in Andresen and it remains for this Court to supply the sorely needed clarification on a question of vital importance to the criminal justice system and to the rights of every citizen of the United States. Therefore, petitioners respectfully urge the Court to accept this question for review.

IV. AN IMPORTANT QUESTION FOR REVIEW IS PRESENTED CONCERNING WHETHER THE FOURTH AMENDMENT REQUIREMENTS ARE MET WHERE A MAGISTRATE, IN ISSUING A SEARCH WARRANT, RELIES SOLELY UPON CONCLUSIONS DRAWN BY A LAW ENFORCEMENT OFFICER, RATHER THAN REQUIRING A PRESENTATION OF THE UNDERLYING FACTS AND CIRCUMSTANCES TO SUPPORT THOSE CONCLUSIONS.

This Court has recently affirmed that

> "The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police

obtain a warrant from a neutral and disinterested magistrate before embarking upon a search." Franks v. Delaware, 438 U.S. 154 (1978).

Justice Jackson made clear the elemental values behind this requirement:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right

> of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." Johnson v. United States, 333 U.S. 10, 14 (1948) (footnotes omitted).

However, in the instant case, the court of appeals permitted the bulwark of protection to be breached by permitting a dilution of the requirement that probable cause for the issuance of a warrant must be demonstrated to a neutral magistrate by setting forth facts and circumstances supporting law enforcement officers' beliefs. In the instant case, rejecting petitioners' arguments that the search warrant affidavit contained only conclusory allegations insufficient to show probable cause, the court of appeals held that a law enforcement officer's "opinions concerning [crime] should be considered in affidavits for search warrants. The issuing magistrate must distinguish between pure conclusory statements and opinions based upon an expert's knowledge and experience." (Opinion of Court of Appeals, Appendix at 16a). The court of appeals went on to hold

that because the expert officer had reviewed documents and had observed actions, the officer's opinions were sufficient to support probable cause for a warrant (ibid.).

In the very first paragraph of the affidavit for the search warrant, the officer claimed that the crimes of Illegal Bingo (R.C. §2915.09) and Engaging in Organized Crime (R.C. §2923.04) were being committed at two bingo operations, and that evidence or fruits of those crimes would be found in the seventeen locations for which search warrants were sought. In the remainder of the first two pages of the affidavit, the officer provided details of the places to be searched.

In order to support his claim that crimes were being committed, the affiant posited three theories of illegal conduct: (1) that attendance at the two bingo operations was understated and, as a consequence, the gross receipts of the games were understated; (2) the two churches which held the licences for the Friday and Saturday night

games were being cheated because those nights were "more lucrative"; and (3) the churches which held the licenses to conduct bingo games were being charged excessive and inflated prices for supplies by the operators. The "facts" for his second theory were contained in paragraph number four. The officer set forth the "facts" for his third theory in one sentence for each bingo operation. The remainder of the "fact" section of the affidavit was used to describe the first theory concerning attendance and the supposed interrelationship of the places to be searched.

In order to show that the attendance and, thereby, the gross receipts were being misstated, the officer claimed that "crowd estimates" by deputy sheriffs on "twenty plus times"(during the course of fourteen (14) months - April, 1977, to June 1978) ranged "from 400 to 650 people." Conspicuously absent from the affidavit was any description of how the "estimate" was obtained, whether it was a simple guess, or an attempt to

count heads, or counting empty chairs. Nothing was supplied to describe the process of the estimates. The "estimates" were, thus, thinly veiled hearsay conclusions.

The affiant juxtaposed the crowd estimates against the claim that the bingo operators reported to the Attorney General a crowd of 300 to 400 people per night. His conclusion from these "facts" is that the operators' reports were "inconsistent with the estimates of the Sheriff's Department, and the actual counts taken by the Attorney General during their formal audits" (emphasis supplied, affidavit page 3, paragraph 2). The latter statement is particularly astounding in light of the total absence of any attendance figures from the Attorney General's audits. Indeed, the officer even failed to indicate whether the crowd estimates and the audits covered the same time period as that for which the operators submitted reports.

The affiant concluded the third paragraph by contrasting the average daily gross

receipts of $4,174.00, reported by the operators of the Lakemore Plaza bingo game to the Attorney General, with a figure of $6,000.00 to $9,000.00 in gross receipts which was the product of the Sheriff's Deputies' crowd estimates multiplied by the affiant's per player expenditure estimate. However, this comparison was meaningless, not only because of the lack of factual support for the crowd estimates, but also because if the spending estimate of $15.00 is multiplied times the bingo operators' reported average crowd of 300 to 400 people per night, the result of $4,500.00 to $6,000.00 is completely consistent with the Attorney General's listed audits of gross receipts of the Mahoning Road bingo game: $4,442.50, $5,924.50, $6,383.95, $4,795.75. Certainly, no taint of illegality was shown by these figures.

It is abundantly clear that the officer's theory of illegality because of misstatement of attendance and gross receipts was grounded on unsupported, conclusory statements.

Moreover, the few facts which were provided in paragraphs two and three were completely consistent with the conclusion that the games were operated legally.

The officer's second theory of illegality was set forth in paragraph four on pages three and four of the affidavit. He implied that the churches holding licenses for Friday and Saturday nights were cheated because they received money payments which were less than or the same as the payments to churches holding the bingo licenses for Thursdays and Sundays, and Friday and Saturday nights were "substantially more lucrative" than the others. Nowhere did affiant provide any facts to support this statement about the "lucrative" nature of Friday and Saturday nights. Furthermore, the audit of the Lakemore game on Thursday, March 23, 1978, referred to in the affidavit, contradicted that claim and demonstrated substantially higher receipts than the March 24, 1978, audit of the Lakemore game on a "lucrative" Friday night.

The third and final theory concerning illegality was that the bingo operators ran supply companies which overcharged the churches for supplies. However, nothing was supplied to the magistrate in order for the magistrate to reach his own, constitutionally mandated, independent conclusion concerning the prices charged.

Nothing else in the entire affidavit lends any support to a finding of probable cause for the issuance of the search warrants. Paragraph number 5 details the alleged transportation of the money and records from the bingo halls through the various homes and places which were sought to be searched. However, the transportation of money and records set forth in the affidavit is equally suggestive of innocent as well as criminal conduct.

Although affidavits are not to be read in a hypertechnical manner, United States v. Ventresca, 380 U.S. 102 (1965), the affiant in this case had the aid of prosecutors to

develop the facts necessary for a showing of probable cause. Furthermore, the affidavit makes clear that the investigation of these games had been going on for at least fourteen months. This clearly cannot be said to be a case of an affidavit "drafted by nonlawyers in the midst and haste of a criminal investigation." United States v. Ventresca, supra, 380 U.S. at 108. There is no doubt in this case that the showing of illegality in this affidavit is attempted only through conclusory statements. Unable to recite facts, the affiant and prosecutors relied on the quantity of sentences and paragraphs to support their allegation of probable cause. The only true "facts" in this affidavit described purely innocent behavior.

Viewed in its entirety, this affidavit utterly fails to set forth sufficient facts to allow an independent, detached magistrate to draw his own conclusions concerning probable cause. At every critical juncture in the affidavit where an allegation of illegality

is made, the affidavit contains nothing more than bald, conclusory statements. In some instances, the conclusions are strung together to reach further unsupported conclusions. Clearly the affidavit in this case was insufficient to support probable cause and the items seized should have been suppressed. Mapp v. Ohio, 367 U.S. 643 (1961).

As the court of appeals opinion in this case clearly demonstrates, this Court's pronouncements in United States v. Ventresca, supra, have been miscontrued. Subsequent decisions by this Court have emphasized the central role that an independent magistrate's determination of probable cause plays in safeguarding Fourth Amendment rights. Continued misinterpretation of Ventresca by lower courts will continue to defeat this Court's attempts to supply guidance to a complex and important question of constitutional law. Therefore, the Court should accept the question presented for review and upon review reverse the judgment of the courts below.

V. AN IMPORTANT QUESTION IS PRESENTED FOR REVIEW CONCERNING WHETHER A STATE CRIMINAL STATUTE VIOLATES THE FOURTEENTH AMENDMENT WHERE CRIMINAL LIABILITY ATTACHES UNDER THE STATUTE UPON STANDARDS WHICH ARE NOT DEFINED.

During pretrial proceedings, petitioners Merlo, Parks and Blackford moved to dismiss count 2 of the indictment, conducting an illegal bingo game, R.C. §2915.09)(A)(2), because the statute was unconstitutionally vague (2T. 15-16, 5T. 63). On appeal, appellants' assignments of error were overruled.

R.C. §2915.09(A)(2) provides:

> "Sec. 2915.09. (A) A charitable organization that conducts a bingo game shall:
>
> "...(2) Use all of the gross receipts from the bingo game for paying prizes, for the charitable purposes listed in its bingo license application, for purchasing or leasing bingo cards and other equipment used in conducting the bingo game, hiring security personnel for the bingo game, or advertising the bingo game provided that the amount of the receipts so spent is not more than is customary and reasonable for a similar purchase, lease, hiring,

> or advertising, for renting premises in which to conduct the bingo game, and for the maintenance, expense, and cost of a building owned by the charitable organization in which the bingo game is conducted, except that, for each bingo session, the total amount of the gross receipts used for the maintenance, expense, and cost of the building shall not exceed the lesser of two hundred fifty dollars or twenty-five per cent of the gross receipts from the session."

Although the statute lists various expenses which are allowed while conducting a charitable bingo game, the legality of the expenditures rests solely upon the meaning of the phrase:

> "provided that the amount of the receipts so spent is not more than is customary and reasonable for a similar purchase, lease...."

Nowhere in the remainder of the section or in other sections of the Ohio bingo statutes are the phrases "customary and reasonable" and "similar purchases" defined. As a result, one who is conducting a charitable bingo game is given no guidance as to what conduct is prohibited and must guess at its meaning.

In United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921), this Court reviewed the constitutionality of a federal law which prohibited:

> "any person willfully...to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries;... (e) to exact excessive prices for any necessaries...." 255 U.S. at 86.

The Court defined the question before it to be whether the statutory language cited above

> "constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them." 255 U.S. at 89.

The Court held that the statute was clearly unconstitutional. The Court adopted the opinion of the lower court that:

> "[T]o attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." 255 U.S. at 89.

See, Giacco v. Pennsylvania, 382 U.S. 399 (1966).

This Court's recent decision in Calautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675 (1979), is illustrative of the defects present in §2915.09(A)(2). In Colautti, a section of the Pennsylvania Abortion Control Act imposed a penal sanction upon any person who performed an abortion and who failed to make a determination on whether a fetus was "viable." This Court held that the section was unconstitutionally vague. The Court also noted that the ambiguity of the statute was "aggravated by the absence of a scienter requirement with respect to the finding of viability." 439 U.S. at ___, 99 S.Ct. at 683. The Court also noted that the statute was fatally vague because there was doubt as to whether the standard was "purely subjective" or "mixed subjective and objective."

The instant statute also imposes criminal liability without a scienter requirement. Further, the vagueness of §2915.09(A)(2) is

the same as that found fatal to the statute in Calautti. Here, the standard of "customary and reasonable" might well be purely subjective, or mixed subjective and objective. In short, an ordinary person is given no notice of the standards for fixing guilt. Further, the statute leaves a judge and jury free to decide, without any legally fixed standards, what is prohibited and what is not.

Moreover, identical conduct prohibited by §2915.09(A)(2) is also prohibited by the general gambling statute, §2915.02, classified as a misdemeanor. However, because of the vagueness of §2915.09(A)(2), a third degree felony, a prosecutor can exercise unrestrained discretion to charge either a felony or a misdemeanor for identical conduct.

For all of the foregoing reasons §2915.09(A)(2) clearly violates the Fourteenth Amendment. Because the courts below failed to strike down this obviously constitutionally defective criminal statute, persons are threatened with prosecution, are prosecuted

and are convicted under a statute which violates basic due process rights protected by the Fourteenth Amendment. This Court should accept review of this question and in ruling this statute to be unconstitutional, provide additional guidance to the courts and legislatures.

CONCLUSION

This petition presents questions important to the protection of constitutional rights of every citizen. Moreover, review by this Court of the questions presented herein will provide needed clarification and guidance to the daily functioning of the criminal justice system.

Therefore, for all reasons set forth in this petition, petitioners Joseph Merlo, Raymond Parks and Harry Blackford respectfully urge this Court to grant the writ of certiorari and accept this case for review. Upon review, this Court should reverse

petitioners' convictions.

Respectfully submitted,

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